STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JUSTIN MEAUX,

Defendant-Appellant.

UNPUBLISHED
December 27, 2002

No. 236338
Wayne Circuit Court
LC No. 00-013741-01

Before: Bandstra, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to four to ten years in prison for the assault conviction and the mandatory two-year prison sentence on the felony-firearm charge. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The charges against defendant, then eighteen years of age, stemmed from an incident that occurred at the home of the Appleton family on Mead Street in Dearborn. Defendant's long-time friend, Malcolm Appleton, was shot at approximately 5:00 a.m. on October 13, 2000, after returning home to the basement apartment that he shared with his girlfriend and their six-month-old daughter. The prosecution's theory was that animosity had developed between defendant and Malcolm Appleton and that defendant lay in wait for Appleton to return home early that morning and then shot Appleton through the basement window. The victim testified at trial that two or three days before the shooting, defendant asked him to repay some money that Appleton had borrowed from him. When Appleton said he would not or could not repay the money, they fought at two different locations. At one point, defendant aimed a gun at Appleton, but did not fire it. According to the victim and other witnesses, defendant said, "It's gunplay now. . ." Appleton testified that on the morning in question, he was able to see defendant kneeling outside the window and pointing a gun down toward the basement before he was shot. The defense, however, through the testimony of defendant and his sister, maintained that defendant could not have shot Appleton because he was not at the Appleton home at the time of the incident but, rather, was at his own home with his sister. A jury convicted defendant of the aforementioned crimes, and defendant now appeals.

On appeal, defendant first contends that his conviction must be reversed because the trial court erroneously admitted testimony concerning an experiment that was conducted under conditions substantially different from the conditions at the time of the shooting. We disagree.

We generally review the trial court's determinations of evidentiary issues for abuse of discretion, *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996), and the admissibility of experiments performed by experts and non-experts is likewise a matter within the discretion of the trial court. *Duke v American Olean Tile Co*, 155 Mich App 555, 560; 400 NW2d 677 (1986). Demonstrative evidence is admissible if it bears "substantial similarity" to an issue of fact involved in a trial. *Lopez v General Motors Corp*, 224 Mich App 618, 627-628; 569 NW2d 861 (1997), citing *Smith v Grange Mutual Fire Ins Co of Michigan*, 234 Mich 119; 126; 208 NW 145 (1926). See also *People v Ray*, 2 Mich App 623, 630-631; 141 NW2d 320 (1966). The similarity need not be precise in every detail but must include only those circumstances or conditions that might conceivably have some influence in affecting the result in question. *Jenkins v Frison Building Maintenance Co*, 166 Mich App 716, 719; 421 NW2d 275 (1988), quoting 1 Wigmore on Evidence, § 442. Before test results can be admitted, a foundation must be laid showing that the test in question properly duplicated the actual conditions. *Duke, supra* at 560. The lack of exact identity of test conditions goes to the weight and not the competency of the evidence. *Jenkins, supra* at 721, citing *Smith, supra* at 126; *Ray, supra* at 631. The "substantial similarity" rule establishes a threshold requirement of relevancy. *Lopez, supra* at 629, n 16. "Unless the demonstrative evidence bears *enough* similarity to some factual circumstance at issue in the trial, that evidence is not relevant because it advances no germane factual proposition that can meaningfully assist the trier of fact." *Id*. (emphasis in original).

In the instant case, the police officer in charge of the investigation testified about how he conducted an experiment at the scene of the shooting. The officer explained that he was initially concerned that it might be impossible to have seen someone outside the Appleton's basement window early in the morning. Thus, he conducted an experiment to verify that issue. The officer described how he twice tried to duplicate the conditions, which existed on the morning that Appleton was shot. He consulted with Appleton family members who were at the house on the morning of the incident and who gave him relevant information regarding the lighting conditions that existed on October 13 and ultimately concluded that he could see another person outside the window even with the screen in place.

Defense counsel objected to the admission of this testimony on grounds that it was conducted outside the presence of others and the detective was not able to duplicate the actual conditions (time of day, lighting, and condition of the window) at the time of the shooting. Defendant maintained that the detective's experiment did not satisfy the "substantial similarity" test and the prosecution did not sustain its burden of presenting evidence to prove that similar conditions existed. However, the trial court ruled the testimony was admissible, concluding that defendant's complaint concerning the accuracy of the test conditions went to the weight of the evidence, not its admissibility.

We find no abuse of discretion in the trial court's evidentiary ruling. A review of the record indicates that in conducting the experiment the first time, the detective went to the Appleton house at 5:00 a.m., the same hour as the actual shooting, and he had another officer kneel outside the window and run an extension cord through the hole in the screen and down into the basement. The detective stood in the basement and looked up toward the window. He

testified that he could see an object in the officer's hand, but he could not see the officer's face. However, the victim's family subsequently informed the detective that the wrong basement lights had been on during the experiment, which did not accurately duplicate the lighting on the night in question. The detective thus returned, albeit during the evening rather than in the early morning hours, and conducted a second experiment using the lights in the basement that purportedly were on at the time of the shooting. This time, when the light was on over the washer and dryer and the television set was turned on, as testified to by the victim, the detective was able to see the face of the officer outside the window.

In its evidentiary ruling, the trial court implicitly but correctly found the experiment testimony to be substantially similar to the conditions indicated by the victim's testimony. This evidence was germane to a factual issue, identification, and clearly was meant to aid the jurors in their deliberations. Defendant asserts that without the testimony about the second experiment, the jury would have had ample reasonable doubt about who shot the victim. However, the record indicates that while only Malcolm Appleton identified defendant as the assailant, there was abundant circumstantial evidence that pointed solely to defendant as the shooter. Various witnesses testified about prior threats and hostility that existed between defendant and the victim, resulting in angry confrontations shortly before the shooting. Additional evidence indicated that defendant waited at another location with a gun to "scare" Appleton, and defendant himself admitted that he uttered remarks about "gun play." In sum, we conclude that the trial court did not abuse its wide discretion in admitting the demonstrative evidence, which was substantially similar to the conditions on the date in question.

Next, defendant claims that the trial court failed to give legally sufficient substantial and compelling reasons for exceeding the guidelines at sentencing. The court departed from the sentencing guidelines range of nineteen to thirty-eight months for the assault with intent to commit great bodily harm conviction and sentenced defendant to serve four to ten years (48 to 120 months).

Generally, a trial court is required to impose a minimum sentence within the guidelines range. *People v Babcock (After Remand)*, 250 Mich App 463, 465; 648 NW2d 221 (2002). However, a court may depart from the legislative sentencing guidelines range if it has substantial and compelling reason to do so, and it states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). The factors the court relies on in determining that there are substantial and compelling reasons to justify its departure must be objective and verifiable. *Babcock, supra* at 467. Objective and verifiable factors are "external to the minds" of the parties involved in the sentencing decision and "capable of being confirmed." *People v Fields*, 448 Mich 58, 66; 528 NW2d 176 (1995). To be substantial and compelling, objective and verifiable factors must not already be reflected in the guidelines unless the court finds that the characteristic has been given inadequate or disproportionate weight, MCL 769.34(3)(b), and must keenly or irresistibly grab the court's attention and be of considerable worth in deciding the length of a sentence. *Babcock, supra* at 466-467. We review for an abuse of discretion a trial court's determination that objective and verifiable departure factors are substantial and compelling. *Id*. at 467.

Here, the trial court noted that defendant, at age nineteen, was in the habit of carrying and using guns, exhibited "a clear lack of self-control" and, acting without remorse and with ample time to consider his actions, shot his best friend in the back over a very minor disagreement. The

trial court characterized defendant as "extremely dangerous to society." Although this explication was brief, we conclude that the court properly determined that the offense variables did not give sufficient weight to these characteristics of the offense and the offender, and that the court's reasons for departure were substantial and compelling, *Babcock*, *supra*, and were verified by facts of record as well as common sense. As the prosecution notes, defendant's own words underscored his disdain for the law. He admitted to having one pistol taken by police a month or so before the incident and testified that he then obtained another pistol which he pointed at the victim at an apartment complex after a fight. Defendant also testified that he would have shot the victim had he produced a gun on that date. Defendant opined that he was justified in pointing the gun at the unarmed victim that day because the victim had just beaten him in a fight and had not paid back monies owed. On the basis of these facts, we find no error in the trial court's upward departure from the sentencing guidelines.

The trial court also opined that the jury had given defendant "a break," finding defendant guilty of the lesser offense of assault with intent to do great bodily harm less than murder, rather than the original charge of assault with intent to commit murder. With regard to this latter statement by the court, defendant contends that the trial court made an improper independent finding of guilt. See *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997). However, the record belies defendant's contention. Moreover, a court may conclude by a preponderance of the evidence that a defendant committed the crime charged, even though the defendant was convicted of a lesser offense, and may consider that greater crime in sentencing. *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). Thus, defendant's argument in this regard is without merit.

Affirmed.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Richard Allen Griffin